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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053622
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration No. 3,059,241

Mark: J5

UMG RECORDINGS, INC.,

Petitioner,

- against -

SIGGY MUSIC, INC.,

Registrant.

Cancellation No. 92053622

Opposition No. 91200616¹

**PETITIONER'S MOTION FOR JUDGMENT ON PLEADINGS AS TO
REGISTRANT SIGGY MUSIC, INC.'S AMENDED COUNTERCLAIM FOR FRAUD**

¹ On July 11, 2011, Petitioner also filed Opposition No. 91200616 against Registrant's Application Serial No. 77/880,243 for the J5 mark in International Classes 3, 14, 16, 18, 21 and 28. Petitioner's Motion on Consent to Consolidate the opposition and cancellation proceedings is pending before the Board as of the filing date of this motion. (See TTABVue # 24.)

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Petitioner, UMG Recordings, Inc. (“UMG”) by its attorneys, Fross Zelnick Lehrman & Zissu, P.C., hereby moves under Trademark Rule of Practice 2.127, Federal Rule of Civil Procedure 12(c), and Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 504 for judgment on the pleadings dismissing the counterclaim filed by Registrant Siggys Music, Inc. (“Siggys”), which seeks to cancel UMG’s Registration No. 2,881,064 for JACKSON 5 (“UMG’s Registration”).

INTRODUCTION

In this cancellation proceeding, UMG, the owner of the famous, registered, and incontestable JACKSON 5 mark, seeks to cancel Siggys’ Registration of the mark J5. Siggys’ principal—a founding member of the JACKSON 5 musical group—has asserted, under oath to the U.S. Patent and Trademark Office (“USPTO”), that the mark J5 is “an indicator of secondary source or sponsorship” for UMG’s JACKSON 5 mark.² With the odds stacked heavily against it, Siggys responded by lodging a counterclaim seeking cancellation of UMG’s Registration on the grounds that it was purportedly obtained by fraud. UMG moved to dismiss the counterclaim based on its obvious deficiencies. In response to UMG’s motion to dismiss, Siggys tried again, filing an amended counterclaim on the same basic grounds. As discussed below, however, Siggys’ amended counterclaim is still so transparently futile and legally deficient that it cannot withstand scrutiny at the pleadings stage and, therefore, must be dismissed.

Siggys’ fraud counterclaim is a transparent attempt to avoid the consequences of the incontestability of UMG’s Registration. Significantly, incontestability forecloses Siggys from (1) directly challenging UMG’s ownership of the UMG Registration, and (2) claiming that UMG’s Registration is void *ab initio* for failure to use the JACKSON 5 mark as of the filing date of the underlying application. *See generally* 15 U.S.C. §§ 1065, 1115(b); *see also* 15 U.S.C. § 1064; 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:148 at 32-318-19 (4th ed. 2012). Siggys attempts an end-run around these consequences by restyling these claims instead as claims of fraud. As discussed in greater detail below, Siggys’ allegations

² *See* November 25, 2005 Declaration of Sigmund E. Jackson filed in response to July 26, 2005 Office Action concerning Siggys’ application to register the J5 mark at issue in this cancellation proceeding.

of fraud are either plainly disproved by publicly-available USPTO records attached to the pleadings or are again too conclusory, speculative, and unsupported to satisfy the heightened pleading requirements mandated by Federal Rule of Civil Procedure 9(b). Accordingly, UMG respectfully requests that the Board grant judgment on the pleadings to UMG on Siggy's counterclaim.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

UMG filed its Petition to Cancel on February 11, 2011, seeking cancellation of Siggy's Registration No. 3,059,241 for J5 for clothing in International Class 25. As grounds for the cancellation, UMG alleged, *inter alia*, that Siggy's continued registration of the J5 mark would be likely to cause confusion with and dilute UMG's prior-used JACKSON 5, JACKSON FIVE, JACKSON 5IVE, and J5 marks for musical sound recordings and related goods and services. (TTABVUE # 1 ("Petition") at ¶¶ 1, 17-19.) In addition, UMG alleged that the continued registration of Siggy's J5 mark was inconsistent with UMG's Registration for JACKSON 5 for musical sound recordings in International Class 9. (Petition at ¶¶ 2, 17-19.)

On May 26, 2011, Siggy answered UMG's Petition to Cancel, and at the same time filed a counterclaim seeking to cancel UMG's Registration for JACKSON 5 on the ground that the registration had purportedly been "obtained fraudulently" by UMG. (TTABVUE # 11 ("Original Counterclaim") at ¶¶ 46-53.) On June 30, 2011, UMG filed a motion to dismiss Siggy's counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (TTABVUE # 13 ("Original Motion to Dismiss")). In response, Siggy filed an Amended Answer and Counterclaim on July 18, 2011. (TTABVUE # 17 ("Am. Counterclaim") at ¶¶ 43-58). Siggy's amended fraud counterclaim rests on two sets of allegations:

- *First*, Siggy alleges that "in the formal application papers filed on August 13, 2003 by Petitioner's attorney of record [relating to UMG's Registration], it was stated that 'the trademark was first used in connection with the identified goods at least as early as April 30, 1969, and was first used on the identified goods in interstate commerce at least as early as April 30, 1969.'" (Am. Counterclaim at ¶ 46.) Siggy alleges that these statements were "false"

because “[u]pon information and belief,” UMG had not “used the mark JACKSON 5 in connection with the identified goods in interstate commerce at least as early as April 30, 1969 or at all prior to the application filing date” of August 13, 2003. (Am. Counterclaim at ¶ 47(a)) (emphases added). The latter allegation—that UMG had not used the JACKSON 5 mark “at all prior to the application filing date” of UMG’s Registration—was not alleged in the original counterclaim. Rather, it was added to the amended counterclaim in response to UMG’s motion to dismiss, where UMG explained that “the Board repeatedly has held that an erroneous date of first use does not constitute fraud unless, *inter alia*, there was no valid use of the mark until after the filing of the application.” (Original Motion to Dismiss at 6-7 (citing cases)). But the amended counterclaim does not contain a single fact or piece of “information” to support Siggy’s purported “belief” that UMG never used the JACKSON 5 mark prior to the August 2003 application date of UMG’s Registration. As discussed in Section I of the Argument, *infra*, these allegations thus fail to plead a fraud claim with particularity as required by Federal Rule of Civil Procedure 9(b).

- *Second*, Siggy alleges that UMG’s Registration was fraudulently obtained because, in “the formal application papers, as amended [by a USPTO Examining Attorney] by authority granted by UMG’s attorney of record on March 1, 2004, it was stated that “[UMG] is the owner of U.S. Registration No. 965,809,” a prior registration for the mark JACKSON 5 for “entertainment services rendered by a vocal group” in International Class 41. (Am. Counterclaim at ¶ 51 and Exhibit D attached thereto.) Siggy claims that UMG’s statement was “false” because “upon information and belief, [UMG] did not own Registration No. 965,809 on March 1, 2004.” (Am. Counterclaim at ¶ 52(a)). Rather, according to the amended counterclaim, the owner of Registration No. 965,809 on March 1, 2004 was a California limited partnership called MRAC, L.P. (Am. Counterclaim at ¶ 54.) But, as shown in Section II of the Argument, *infra*, the facts and documents contained in the pleadings unquestionably demonstrate that MRAC, L.P. changed its name to Motown Record Company, L.P. in 1993 and that Motown Record Company, L.P. assigned Registration No. 965,809 to UMG on May 14, 2003—

approximately one year before UMG represented the same to the Examining Attorney. Accordingly, the pleadings demonstrate there is no genuine issue of material fact that UMG did own Registration No. 965,809 when it represented the same to an Examining Attorney on March 1, 2004.

UMG answered the amended counterclaim on February 17, 2012. (TTABVUE # 23 (“UMG’s Answer”)).

APPLICABLE LEGAL STANDARDS

I. Rule 12(c) Motions For Judgment On the Pleadings

A Rule 12(c) motion for judgment on the pleadings is designed to provide a means of disposing of cases when “the content of the competing pleadings, exhibits thereto, matters incorporated by reference . . . and any facts of which the [Board] will take judicial notice” demonstrate that there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment on the merits of the controversy, as a matter of law. 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1367 (3d ed. 2004) (hereinafter “Wright & Miller”); *see also, e.g., Forest Labs., Inc. v. United States*, 476 F.3d 877, 881 (Fed. Cir. 2007) (“Judgment on the pleadings is appropriate where there are no material facts in dispute and the party is entitled to judgment as a matter of law.”); TBMP § 504.02.

Additionally, “the Rule 12(c) motion may be employed by the defendant as a vehicle for raising several of the defenses enumerated in Rule 12(b) after the close of the pleadings,” including the defense of failure to state a claim. 5C Wright & Miller, § 1367; *see* FED. R. CIV. P. 12(h)(2).

II. Pleading Fraud With Particularity Pursuant to Federal Rule of Civil Procedure 9(b)

Fraud in procuring a trademark registration only occurs when an applicant for a registration knowingly makes specific false, material representations of fact in connection with an application to register, with the intent of obtaining or maintaining a registration to which it is otherwise not entitled. *See In re Bose Corp.*, 91 U.S.P.Q.2d 1938, 1941 (Fed. Cir. 2009). As the Board has explained, the burden of pleading and proving fraud is extremely high: “[T]he very

nature of the charge of fraud requires that it be proven ‘to the hilt’ with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party.” *Smith Int’l, Inc. v. Olin Corp.*, 209 U.S.P.Q. 1033, 1044 (T.T.A.B. 1981).

Moreover, when petitioning to cancel a registration on the grounds of fraud, “a petitioner must allege the elements of fraud *with particularity* in accordance with Fed. R. Civ. P. 9(b).” *Asian and W. Classics B.V. v. Selkow*, 92 U.S.P.Q.2d 1478, 1478 (T.T.A.B. 2009) (emphasis added). For this reason, “[p]leadings of fraud made ‘on information and belief,’ when there is no allegation of specific facts upon which the belief is reasonably based, are insufficient.” *Id.* at 1479. Thus, under established Board precedent, “to satisfy Rule 9(b), any allegations based on ‘information and belief’ *must be accompanied by a statement of facts* upon which the belief is founded.” *Id.* (emphasis added). In other words, a petitioner must plead a “statement of facts providing the ‘information’ upon which petitioner relies for the ‘belief’ upon which the allegation is founded.” *Id.*

As the Board has explained, this heightened pleading standard for fraud claims serves the salutary purposes of “providing notice, weeding out baseless claims, preventing fishing expeditions and fraud actions in which all facts are learned after discovery, and serving the goals of Rule 11.” *Asian and W. Classics B.V.*, 92 U.S.P.Q.2d at 1479 (citing 5A Wright & Miller, § 1296 n.11).

ARGUMENT

As shown below, UMG is entitled to judgment on the pleadings on both sets of allegations that form the bases for Siggy’s fraud counterclaim. *First*, as to Siggy’s allegations that UMG did not use the JACKSON 5 mark “at all prior to the application filing date” of August 13, 2003, this claim is insufficiently pleaded under Rule 9(b), as it is based entirely on unsupported allegations brought “upon information and belief.” *Second*, as to Siggy’s claim that UMG was not the owner of Registration No. 965,809 on May 14, 2003, the pleadings (and USPTO records attached as exhibits thereto) demonstrate as a matter of incontrovertible fact that

UMG *did* own this registration in May 2003 and, thus, there is no genuine issue of material fact to be resolved and UMG is entitled to judgment in its favor.

I. THE ALLEGATIONS OF A “FALSE” DATE OF FIRST USE ARE INSUFFICIENTLY PLEADED BECAUSE THEY ARE BASED ON UNSUPPORTED “INFORMATION AND BELIEF”

Siggy has failed to state a claim for fraud under Federal Rule of Civil Procedure 9(b) because its allegations of “false” statements concerning UMG’s date of first use of the JACKSON 5 mark in the amended counterclaim are based on unspecified “information” and unsupported “belief.”

Some background serves to further illuminate the insufficiency of Siggy’s current allegations. Specifically, in its original counterclaim, Siggy claimed that UMG fraudulently obtained UMG’s Registration by falsely claiming in its application materials a first use date “as early as April 30, 1969.” (Original Counterclaim at ¶¶ 46-47.) At that time, Siggy’s original counterclaim alleged that UMG “had not used the mark JACKSON 5 . . . as early as April 30, 1969,” but rather, according to Siggy, UMG did not first use the JACKSON 5 mark “until December 1998 at the earliest.” (*Id.* at ¶ 47(a)-(d)). But as UMG pointed out in its motion to dismiss, these allegations were insufficient as a matter of law to state a claim for fraud: even if it were true (which it is not) that UMG did not use the JACKSON 5 mark until 1998, this date of first use would *still* precede the August 2003 application filing date for UMG’s Registration, and the Board repeatedly has held that “an erroneous date of first use does not constitute fraud unless, *inter alia*, there was no valid use of the mark until after the filing of the application.” (Original Motion to Dismiss at 6-7, quoting *W. Worldwide Enters. Grp., Inc. v. Qinqdao Brewery*, 17 U.S.P.Q.2d 1137, 1141 (T.T.A.B. 1990).) Thus, Siggy’s original counterclaim allegations on their face demonstrated that there was no fraud.

Recognizing its fundamental error of law, Siggy’s amended counterclaim (without explanation) deletes entirely the allegation that UMG began using the JACKSON 5 mark in December 1998, and replaces it with the new allegation that “*upon information and belief*” UMG

did not use the JACKSON 5 mark “at all prior to the application filing date” of August 13, 2003. (Am. Counterclaim at ¶ 47(a) and Exhibit B thereto) (emphasis added).

In a half-hearted attempt to support this new allegation, Siggy states that it “bases its belief on the fact that UMG did not come into existence until 1998.” (Am Counterclaim at ¶ 47(b)). But even taking this fact as true for purposes of this motion, this purported “fact” does *not* support Siggy’s “belief” that UMG did not use the JACKSON 5 mark between 1998 and August 2003, when the application for UMG’s Registration was filed with the USPTO. Nor does Siggy attempt to explain the blatant inconsistency between the allegations of the original counterclaim and amended counterclaim in this regard, or provide any facts or information that would permit Siggy to make this new fraud allegation. In short, there is not a *single fact* provided to support Siggy’s “belief” that UMG did not use the JACKSON 5 mark prior to the August 2003 application date.

Likewise, Siggy does not provide any facts or information to support the notion that UMG’s attorney of record *knew* that UMG had purportedly not used the JACKSON 5 mark prior to the filing of the application for UMG’s Registration. *See Bose Corp.*, 91 U.S.P.Q.2d at 1941 (fraud requires knowledge of the falsity of the statement, as well as a specific intent to deceive the USPTO). As such, Siggy’s allegations are simply bald conclusions devoid of the requisite factual information. Under black-letter law, these “information and belief” allegations—devoid of any “specific facts upon which the belief is reasonably based”—are “insufficient” under Federal Rule of Civil Procedure 9(b). *Asian and W. Classics B.V.*, 92 U.S.P.Q.2d at 1479. Accordingly, UMG is entitled to judgment on the pleadings as to Siggy’s counterclaim for fraud based on allegations concerning UMG’s date of first use.

II. THE ALLEGATION OF A “FALSE” OWNERSHIP STATEMENT IS REFUTED BY USPTO RECORDS

As the facts set forth in the pleadings demonstrate, Siggy’s fraud claim based on UMG’s alleged false statements to a USPTO Examining Attorney concerning ownership of Registration No. 965,809 fails as a matter of law.

Siggy alleges that UMG's Registration was fraudulently obtained because, in "the formal application papers, as amended [by a USPTO Examining Attorney] by authority granted by [UMG]'s attorney of record on March 1, 2004, it was stated that '[UMG] is the owner of U.S. Registration No. 965,809,'" a prior registration for the mark JACKSON 5 for "entertainment services rendered by a vocal group" in International Class 41. (Am. Counterclaim at ¶ 51 and Exhibit D attached thereto.) Siggy claims that UMG's statement to the Examining Attorney on March 1, 2004 that UMG was the owner of Registration No. 965,809 was "false" because "upon information and belief, [UMG] did not own Registration No. 965,809 on March 1, 2004." (Am. Counterclaim at ¶ 52(a)). Rather, according to the amended counterclaim, the owner of Registration No. 965,809 on March 1, 2004 was a California limited partnership called MRAC, L.P. (Am. Counterclaim at ¶ 54.) But the facts and exhibits contained in the parties' pleadings *disprove* Siggy's allegations beyond doubt or, at the very least, negate a claim of fraud.

As the amended counterclaim alleges, Registration No. 965,809 was originally owned by The Gordy Company and was assigned to Motown Record Company, L.P., a Delaware limited partnership ("Motown Delaware"), in 1992. (Am. Counterclaim at ¶ 52(c)-(d) and Exhibits E-F attached thereto.) Next, as the amended counterclaim explains, on September 2, 1993, Motown Delaware assigned Registration No. 965,809 to MRAC, L.P., a California limited partnership. (*Id.* at ¶ 52(e)-(f) and Exhibits E and G attached thereto.) The amended counterclaim then alleges that, in May 2003, a California limited partnership called Motown Record Company, L.P. ("Motown California") assigned Registration No. 965,809 to UMG. (*Id.* at ¶ 52(g)-(h) and Exhibits E and H attached thereto). Based on these facts, Siggy asserts a break in the chain of title for Registration No. 965,809 to UMG because, according to Siggy, Motown California "did not own any interest or goodwill in Registration 965,809 at the time it purported to assign" the registration to UMG in May 2003. (*Id.* at ¶ 53.) Rather, according to Siggy, MRAC, L.P. "was the rightful owner" of Registration No. 965,809 "from September 2, 1993 until the expiration of the registration on May 8, 2004." (*Id.* at ¶ 54.)

But Siggy has overlooked one important fact: MRAC, L.P. *changed its name* to Motown Record Company, L.P. (*i.e.*, Motown California) on September 2, 1993, which explains away the purported break in the chain of title alleged by Siggy in its counterclaim. This fact is of public record with both the USPTO and the California Secretary of State, as shown by the USPTO records attached to UMG's Answer. (*See* UMG's Answer ¶ 12 and **Exhibits 1-3** attached thereto.) Specifically, the August 30, 1993 Amended and Restated Limited Partnership Agreement for MRAC, L.P. (which is on file with the USPTO at Reel/Frame 1286/250-1286/279) states that, upon assignment to MRAC, L.P. of the assets of Motown Delaware, including Registration No. 965,809, MRAC "shall change its name to MOTOWN RECORD COMPANY, L.P." (UMG's Answer at **Exhibit 1** at ¶ 2.1.) As both the amended counterclaim and UMG's Answer explain, the assets of Motown Delaware, including Registration No. 965,809, were in fact assigned to MRAC, L.P. on September 2, 1993. (Am. Counterclaim ¶ 52(f) and Exhibit G; UMG's Answer at ¶ 12 and **Exhibit 2.**) Thus, on that same date and after receiving all of Motown Delaware's assets, MRAC, L.P. changed its name to Motown Record Company, L.P. (*i.e.*, Motown California), and recorded the name change with the California Secretary of State (a document that is also on file with the USPTO at Reel/Frame 1996/291). (UMG's Answer at ¶ 12 and **Exhibit 3.**)

As of September 2, 1993, Motown California *was* the owner of all interest and goodwill in Registration No. 965,809, and thus possessed the requisite legal authority to assign its interest to UMG in 2003. On the face of the pleadings and their exhibits, there is simply no defect in UMG's chain of title.³

In any event, as above, Siggy does not allege any facts or information to support the notion that UMG's attorney of record *knew* that her March 1, 2004 representation was supposedly false, let alone that she intended to deceive the USPTO. At best, Siggy has unearthed evidence that counsel for UMG's predecessor in interest inadvertently failed to record

³ In another context, the Board has recognized that UMG is, in fact, the successor-in-interest to the MOTOWN record label. *See UMG Recordings, Inc. v. Mattel, Inc.*, 100 U.S.P.Q. 2d 1868 (T.T.A.B. 2011).

one of the steps in a complicated series of transactions that took place over a decade earlier on September 2, 1993. Simply identifying a gap in the chain of title recorded with the USPTO does not give Siggy free reign to infer and allege fraud in the complete absence of other corroborating facts.


Accordingly, UMG is entitled to judgment on the pleadings as to Siggy's fraud counterclaim based on allegations concerning UMG's claim of ownership of Registration No. 965,809.

CONCLUSION

For the reasons set forth herein, UMG respectfully requests that the Board enter judgment on the pleadings in favor of UMG as to Siggy's counterclaim seeking cancellation of UMG's Registration. UMG further requests that this Proceeding be suspended during the pendency of this partially dispositive motion pursuant to Trademark Rule of Practice 2.117.

Dated: New York, New York
April 27, 2012

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CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of April 2012, a copy of the foregoing **PETITIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO REGISTRANT SIGGY MUSIC, INC.'S AMENDED COUNTERCLAIM FOR FRAUD** was sent by first class mail postage pre-paid, and by e-mail, to Registrant's counsel of record as follows:

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